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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

NO. 261

REVERE LAND COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION OF REVERE LAND COMPANY FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT AND BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI.**

✓
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IN THE
Supreme Court of the United States

<hr style="width: 20%; margin-left: 0;"/> <p>REVERE LAND COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.</p>	}	<p>October Term, 1948 No.</p>
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**PETITION OF REVERE LAND COMPANY FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

*To the Honorable, the Chief Justice of the
United States, and the Associate Justices
of the Supreme Court of the United States:*

The petitioner, Revere Land Company (respondent in the Court below but herein referred to as the "petitioner") respectfully prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Third Circuit, entered June 18, 1948,* reversing a decision of the Tax Court of the United States entered January 10, 1947.

* The Court's Opinion was subsequently revised but the revision did not alter the legal effect of the decision.

Summary Statement of the Matter Involved.**A. THE PROCEEDINGS BELOW.**

The Tax Court of the United States decided the case below in favor of the petitioner; its Opinion was promulgated October 29, 1946, and is officially reported in 7 T.C. 1061. On June 18, 1948, the Circuit Court of Appeals for the Third Circuit entered its Opinion, reversing the decision of the Tax Court; such Opinion has not yet been officially reported but is a part of the record being filed herewith. On July 2, 1948, within the 15-day period prescribed by the Rules of the Circuit Court of Appeals, the petitioner filed a petition for rehearing, which is also a part of the aforesaid record. On July 19, 1948, the Circuit Court of Appeals held a hearing to determine whether or not a rehearing should be granted and on July 29, 1948, it entered an order denying the petition for rehearing but correcting its prior Opinion in the manner set forth below. Such order is not yet officially reported but it is a part of the record being filed herewith.

A certified copy of the record before the United States Circuit Court of Appeals, consisting of the Appendix to the respondent's brief* before such Court and all of the proceedings before such Court, is being filed herewith.

* The respondent herein was the petitioner in the Court below and the Appendix therefore appears in the record as the Appendix of the petitioner below. Subsequent references herein to the Appendix relate to the said Appendix of the petitioner below. Record references relate to the record before the Circuit Court of Appeals.

B. THE FACTS OF THE CASE.

This petition seeks the review of a decision of the Circuit Court of Appeals for the Third Circuit, which reversed a decision of the Tax Court of the United States. The Tax Court's decision denied a determination by the respondent, the Commissioner of Internal Revenue, that there were deficiencies in the petitioner's federal income taxes for the taxable years 1939, 1940 and 1941 and determined that the petitioner was entitled to refunds for such years in the respective amounts of \$4,070.83, \$4,257.74 and \$5,480.95.

The Opinion of the Circuit Court of Appeals, it should be noted, dealt with two cases, viz., (1) the case which is the subject of this petition*; and (2) a related case entitled "*Grant Building, Incorporated, Petitioner v. Commissioner of Internal Revenue, Respondent*, No. 9539", which will be referred to, for convenience, as the "Grant case."

The petitioner in this case recognizes that the record in the *Grant* case is not before the Court on this petition. It is nevertheless necessary to refer to the Circuit Court's opinion in the *Grant* case because one of the petitioner's specifications of error is based upon the fact that the Circuit Court of Appeals combined the two cases in its Opinion and "*borrowed*" facts from one case to reach a decision in the other.

The relationship between the two cases amounts to this: in the petitioner's case, decided on January 10,

* Entitled, in the Court below, "*Commissioner of Internal Revenue, Petitioner v. Revere Land Company, Respondent*, No. 9450."

1947, the Tax Court held that this petitioner was entitled to depreciation on its investment in a certain building erected on land owned by the petitioner and leased by it to Grant Building, Incorporated; in the *Grant* case, decided on August 26, 1947, the Tax Court determined that the rival claimant, the petitioner's lessee, was *not* entitled to depreciation on the petitioner's investment. The Circuit Court of Appeals, dealing with an appeal by the Commissioner of Internal Revenue in the *petitioner's* case and a subsequent appeal by Grant Building, Incorporated, *against* the Commissioner in the *Grant* case, reversed *both* of the Tax Court's rulings, with the result that the petitioner has been *denied* a depreciation deduction to which it believes itself rightfully entitled and a rival claimant, which neither made the investment nor acquired petitioner's title thereto, allowed depreciation upon the petitioner's investment.

In stating the facts,* we are not obliged to rely upon any inference or argument, because *all* of the facts which we are about to recite were "*found*" by the Tax Court, upon the basis of a *stipulation of facts* between the petitioner and the Commissioner. This condition of the record is emphasized at the very outset because it is one of our contentions that the Circuit Court has rested its decision on inferences which are hostile to the stipulated facts.

The petitioner was organized as a corporation in July, 1927 (App. 3A). Shortly after its incorporation,

* The Court below, as we have indicated, did not confine its deliberations to these stipulated facts but utilized evidence from the record in the *Grant* case; our references to the other record will be limited to the Court's opinion and will be appropriately earmarked.

it entered into an Agreement (App. 4A) with another corporate organization known as Strasswill Corporation, which we will refer to for convenience as "Strasswill." *At the time*, the petitioner had *no* interest in Strasswill; it did acquire shares of Strasswill's stock *eleven* years later but the circumstances of the later acquisition are not revealed by the record and they do not appear to be material.

The Agreement with Strasswill, which was dated July 30, 1927, is the *key* to a proper solution of the case and therefore merits close attention. When it was made, the petitioner was negotiating for three contiguous pieces of land, suitable for an office building (App. 10A) and Strasswill had made arrangements (App. 10A) to finance *part* of the construction costs of such a building.* The Agreement therefore provided that *if* the petitioner should acquire the three parcels of land and *if* Strasswill should be able to procure *other* construction funds, the petitioner would give Strasswill the option to call upon the petitioner (a) to contribute approximately \$1,025,000 to the construction of the proposed building and (b) to lease the *land and building* to Strasswill for 99 years at an annual rental equal to 6% of petitioner's investment in the *land and building*. In describing this Agreement, we have emphasized by italics certain fundamental portions and we are willing to assume the hazards of repetition by pointing out once more these two salient points: (1) the entire agreement was conditioned upon the petitioner's becoming the

* The opinion of the Circuit Court implies that at the time Strasswill had some interest in the three parcels of land; there is nothing in the record in this case or in the *Grant* case to justify such an inference.

owner of the land; and (2) the petitioner was required to provide funds for building part of the structure which was to be leased to Strasswill.

The petitioner proceeded to acquire the three tracts of land and it is established by the stipulated facts that the *entire* consideration *for the land* amounted to \$1,273,772.50 and that all of such consideration was paid by the petitioner to the owners of the land (App. 7A, 16A, 19A). It was further stipulated (App. 7A) that these three tracts of land were the *only real estate acquired* by petitioner. The Circuit Court's opinion emphasizes the fact that the petitioner, *on its books*, treated not only these payments but also its contribution to the cost of the building, as part of the "cost" of the land, but the record is clear, and *the Tax Court so found*, that the sellers of the land received *only* the aggregate amount just stated and that Strasswill did not *at any time* have any interest in the land to sell to the petitioner (App. 37A). As a consequence, no matter how the petitioner may have handled the transactions accountingwise, it is *undisputed* that its *actual land cost* was only \$1,273,772.50 (App. 38A).

On the day the Agreement described above was signed, Strasswill assigned it to its subsidiary, Grant Building, Incorporated (App. 5A), which is the rival claimant to depreciation on the money involved and which we will refer to for convenience as "Grant." The Circuit Court has attached great significance to the fact that Grant issued to Strasswill an amount (in par value) of its stock equal to the petitioner's subsequent contribution to the cost of the building, but there is nothing in *this* record which would indicate that the petitioner sanctioned or knew of the exchange or, for

that matter, that there was such an exchange. In other words, so far as the facts in *this* case are concerned, Strasswill, being entitled to call upon the petitioner to pay \$1,025,000 toward the cost of construction of a building *on petitioner's land*, assigned the right to *its* subsidiary, *in which the petitioner had no interest whatsoever*, for a consideration unknown to petitioner (App. 5A). It is equally clear that the petitioner did *not* receive *any stock or other consideration* for its contribution to the cost of the building, other than Strasswill's agreement to lease the completed building for 99 years (App. 26A).

After the assignment of the July 30 Agreement, Grant exercised the option to take the lease proposed in the Agreement (App. 5A). The petitioner completed its acquisitions of the three parcels of land, paying the aggregate consideration set forth above, and receiving record title (R. 82, 85, 91). Grant made its arrangements to finance *part* of the cost of the building. The remaining cost, amounting to a total sum of \$1,026,227.50, was paid by the petitioner, \$1,002,500 being paid out by a trustee to the contractor and the balance by the petitioner to Grant. It was *stipulated* below (App. 6A) that the *entire* sums so paid were applied *exclusively* toward construction of a building which, it is clear, constituted property held for the production of income. Petitioner never divested itself of its title to the \$1,026,227.50 or to the interest in the building in which this sum was invested.

Following these transactions, the petitioner leased the land and the projected building to Grant (Strasswill's assignee) for 99 years (with renewal options in Grant) at an annual rental of \$130,000, representing 6% of the *sum* of (a) the petitioner's expenditures for

the three tracts of land (*minus* an award received upon a condemnation of a part of the land) and (b) the petitioner's payments on account of the cost of the building, which latter amount was, as we have stated, \$1,026,227.50. The details of the lease (Exhibit No. 8 of Petitioner below, offered at R. 11, set forth at R. 126-175, incl.) were not accorded much significance in the opinions of the Court below, but in the interests of completeness, we mention the following:

1. The lessee covenanted to make "repairs" to the building but *not* to replace it or to surrender it "in the same" condition at the end of the term;

2. The lease contained a reversionary clause covering building as well as land, effective upon the termination of the term or sooner upon default;
and

3. The petitioner retained control over the building in that the lease prevented its removal or alteration without the petitioner's consent.

As a result, it is quite clear that the petitioner had an actual, as well as a legal, interest in the building and bore the loss which inevitably would result from its deterioration.

From the time of the completion of the building until 1943, the petitioner did not deduct any allowance for depreciation on its share of the cost of the building, but in 1943, the petitioner filed claims for refund of income taxes paid with respect to the years 1939, 1940 and 1941, assigning as grounds for such refunds its claim to depreciation on its share of the building cost for such years. In the proceedings before the Tax Court, it was *stipulated* between the petitioner and the Commissioner that the building had a depreciable life of 50 years, or at the rate of 2% per year (App. 8A, 9A). The Com-

missioner reserved the right to contend that *by reason of the provisions of the lease* petitioner was not entitled to such depreciation. The Tax Court concluded that the petitioner was entitled to depreciation, since the lease contained no provision obligating the petitioner to restore the property to its original condition at the end of the term.

The *Grant* case came before the Tax Court after the decision in the petitioner's case and the Tax Court, on August 26, 1947, in effect affirmed its decision in the *Revere* case by holding that *Grant* was *not* entitled to depreciation on the portion of building cost paid by the petitioner, and affirmed the Commissioner's assessment of deficiencies against *Grant* for the years 1939, 1940 and 1941. In that case, the Tax Court relied upon this Honorable Court's opinion in *Detroit Edison Company v. Commissioner*, 319 U.S. 98 (1943).

On appeal to the Court below, as we have already pointed out, both decisions of the Tax Court were reversed, without remand, with the result that the petitioner was denied the right to the depreciation allowance and *Grant* was allowed it.

A significant feature of the Opinion below is that it not only considered both appeals together, it also freely discussed evidence in one case in its treatment of the other. This confusion of the records would not be objectionable if both cases had been remanded to afford petitioner an opportunity to contest *Grant*'s claims; but since both were reversed without remand, it becomes material to inquire to what extent the evidence was intermingled.

The confusion between the records could be explained in intimate detail but such a procedure would

further prolong this already extended statement of the facts. We will therefore confine ourselves to a few salient examples: (1) In the *petitioner's* case, it appeared that Strasswill, after procuring the petitioner's commitment to buy the land and pay part of the building cost, assigned the commitment to Grant, without any consideration moving to the petitioner; in the *Grant* case, it was shown that *Strasswill* received Grant stock for its assignment; it was not proved in *either* case, however, that the issuance of Grant stock against the assignment was with the knowledge, consent or approval of petitioner; (2) in the *petitioner's* case, it appeared that *after* the trial before the Tax Court, Grant filed two petitions to intervene which were properly denied by the Tax Court and the denial of which the Court below considers reversible error; and (3) in the *petitioner's* case, petitioner's counsel offered in evidence a *certified* copy of the construction contract between Grant and the building contractor, which the Court below, again drawing on the record in the *Grant* case, says was not an exact copy.

This third item has been withdrawn by the Court below on a petition for rehearing and we believe that the Circuit Court is deserving of commendation for its promptness in correcting the injustice done by its opinion. Nevertheless, the facts of the transaction must be set forth to demonstrate the confusion which resulted from the Court's procedure in intermingling the two separate records.

In both cases, the taxpayers offered in evidence the building contract between Grant and the contractor which erected the building. In the petitioner's case, the exhibit so offered consisted of a copy, *certified* by the contractor as a correct copy; in the *Grant* case, the ex-

hibit purported to be a photostatic copy of the original document. Both exhibits contained a recital that Grant was to be referred to in the agreement as the "owner"; in fact, both exhibits were identical in every respect, except that in the *Grant* case the exhibit contained an *addendum* to the signatures indicating that the petitioner had actually approved the form of the agreement. In its *original* Opinion, the Circuit Court, *although disclaiming that its comment was material*, pointed out that the specific approval of the agreement with its recital that Grant was the owner of the projected building amounted to a damaging *admission* by the petitioner. It therefore concluded that the petitioner's counsel had suppressed the original to avoid the admission, on the basis of which it charged him, in its *published* opinion, with "improper" and "shocking" conduct in violation of the Canons of Ethics. Entirely overlooked in this forthright condemnation of an attorney of 45 years' practice were the following essential facts: (a) counsel's exhibit, offered by him, *did* contain the admission considered so damaging by the Court below; (b) counsel *stipulated* that the exhibit, *including the "admission"*, had been either *approved or ratified* by the petitioner; and (c) the exhibit offered by petitioner's counsel, to which petitioner was *not a party*, bore a certificate by a party that it was a true copy.*

* As a matter of fact, there is no evidence in either record that the exhibit in the *Grant* case was accurate or that the certified copy in the *petitioner's* case was not. Both were *stipulated* by the Commissioner to be correct. Further, there is no evidence in either case that counsel had seen the exhibit in the *Grant* case or knew of any difference between the two exhibits.

On a petition for rehearing, the Circuit Court heard testimony by the petitioner's counsel and as a result issued an order correcting its out-of-hand condemnation by striking it from the Opinion. However, although the Court's action in this respect may have softened the impact, *upon counsel*,** of the Court's widely publicized condemnation, it should remain in the record as proof of the error of intermingling the records.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended [28 U.S.C. 347(a)] and Section 1141 of the Internal Revenue Code [26 U.S.C. 1141(a)].

Questions Presented.

1. Whether the owner and lessor of a building is entitled to deduct depreciation on the portion of the cost of the building which it paid under an agreement with the lessee that the lessor would acquire the land, pay part of the cost of constructing a building thereon and lease the land and the building to the lessee, who would pay the balance of the building cost.

2. Whether a determination by the Tax Court of the United States that the taxpayer had the kind of

** The term "softened" is used because to an attorney of 45 years' practice, a withdrawal of the charge that he engaged in shocking and reprehensible tactics provides small consolation, especially in a tax case, which is always widely publicized in the various tax services, etc. Moreover, the Court's order reversing its opinion merely stated that certain parts should be stricken, without indicating, to the public, that the eliminated material related to its unjustifiable condemnation of counsel.

interest in a building which entitled it to a deduction for depreciation is a determination of a question of fact or of a mixed question of fact and law which cannot be reversed by the Circuit Court of Appeals in the absence of a "clear-cut mistake of law" within the meaning of *Dobson v. Commissioner*, 320 U.S. 489 (1943).

3. Whether the Circuit Court of Appeals may take judicial notice of evidence appearing in the record of another case and use such evidence as a basis for reversing, *without a remand*, the decision of the Court below in the instant case.

**Reasons Relied on for the Allowance of the
Writ of Certiorari.**

1. The decision of the Court below is in conflict with applicable decisions of this Court which hold that, for federal income tax purposes, the person who makes an actual investment in a depreciable asset and bears the loss of its useful value is entitled to a depreciation deduction thereon as against the person who has technical ownership thereof.

2. The decision of the Court below that petitioner had no depreciable capital investment in the building is in conflict with decisions of the Circuit Courts of Appeal for the Fourth and Seventh Circuits which hold that a person who pays part of the cost of a depreciable asset has a capital investment therein and is entitled to a deduction for depreciation on his portion of such cost, even though he did not actually construct the asset or have legal title thereto.

3. The decision of the Court below is in conflict with applicable decisions of this Court which hold that

a determination by the Tax Court on a matter of proper tax accounting, involving a pure question of fact or a mixed question of law and fact, may not be reversed by the Circuit Court of Appeals in the absence of a "clear-cut mistake of law."

4. The decision of the Court below is in conflict with applicable decisions of other Circuit Courts of Appeal which hold that, in deciding the case before it, the Court may not take judicial notice of evidence appearing in the record of another case, unless such notice is necessary to prevent a grave miscarriage of justice and the person against whom such evidence is noticed is given an opportunity to rebut or explain such evidence before the trial court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

REVERE LAND COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	}	October Term, 1948 No.
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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

Opinions Below.

The Opinion of the Tax Court of the United States was promulgated October 29, 1946, and is reported in 7 T.C. 1061.

The Opinion of the Circuit Court of Appeals for the Third Circuit was entered on June 18, 1948 and is not yet officially reported. On July 29, 1948, the Circuit Court of Appeals entered an order revising the aforesaid Opinion but such revised Opinion is not yet officially reported. Both Opinions are included in the record being certified to this Court.

Jurisdiction.

The judgment sought to be reviewed is a final judgment of the Circuit Court of Appeals for the Third Circuit, *reversing* a decision of the Tax Court of the United States. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended [28 U.S.C. 347(a)] and Section 1141 of the Internal Revenue Code [26 U.S.C 1141(a)].

Statutes Involved.

The Statute involved is Section 23 of the Internal Revenue Code, which, as amended by Section 121 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798, reads as follows:

"In computing net income there shall be allowed as deductions:

(L) A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income." [26 U.S.C., Section 23]

Statement of Facts.

The essential facts are recited in the Petition under the caption "Summary Statement of the Matter Involved" (see pages 2 to 12, *supra*) and therefore are not repeated in this brief.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in the following respects:

1. In ruling that the owner of land is not entitled to an allowance for depreciation, for federal income tax purposes, on the amount which such owner contributed to the cost of erecting a building upon the land, there being no agreement on the part of the owner's lessee to surrender the building to the owner at the end of the term with the ravages of depreciation restored.

2. In ruling that the owner of land and a building is precluded from claiming an allowance for depreciation, for federal income tax purposes, on the portion of the cost of the building paid by such owner, because such owner entered the payment on its books as an element of its land cost and for several years claimed no depreciation thereon.

3. In ruling that the decision of the Tax Court that the lessor of a building had actually paid part of the cost thereof and was therefore entitled to an allowance for depreciation thereon, for federal income tax purposes, was a determination of a question of law instead of a decision as to proper tax accounting which is a question of fact or a mixed question of law and fact not subject to review except for a "clear-cut mistake of law."

4. In taking judicial notice of evidence in another case before it in deciding the instant case, without giving the petitioner an opportunity to rebut or explain such evidence by remanding the instant case for further proceedings before the trial court.

Summary of Argument.

It was stipulated as a fact (App. 6A) that the petitioner invested the sum of \$1,026,227.50 in a building erected on land which it owned and leased "for the production of income." The balance of the building cost was paid by the lessee. The petitioner received no consideration for its contribution except an agreement of lease which did *not* require the lessee to restore the building at the end of the term to its original condition. As a consequence the case is governed by decisions of

this Court which hold that the right to depreciation is determined by two factors, viz., *actual investment*, and the inevitable *burden of loss* due to obsolescence and deterioration. Bookkeeping practices and technicalities of legal title are not important. Moreover, at least two Circuit Courts of Appeal have ruled that a person who contributes funds to a capital improvement in which he has a business interest (which need not be either direct ownership or an interest in the operation or operating results of the property) is entitled to a depreciation allowance on his share of the cost. And finally, the determination by the Tax Court that the petitioner had a depreciable interest in the building was a decision on a question of fact or at least a mixed question of fact and law, which should not have been reversed by the Court below, especially since the Tax Court's ruling concerned a matter of proper tax accounting in which field the Tax Court presumably is expert.

In addition, the Court below was undoubtedly influenced by evidence appearing in the record in the *Grant* case, as shown by its reliance on the allegations of Grant's motions to intervene in the petitioner's case and by the fact that it *preferred* Grant's *rival* claim to depreciation although such claim could not be sustained except by evidence appearing in the *Grant* record. It is a well accepted principle, established by decisions of this Court and other federal tribunals, that evidence appearing in another record may not be "noticed" unless there are grave reasons for doing so and the person against whom it is used is given an opportunity to explain or rebut it in further trial proceedings.

ARGUMENT.

I.

The Decision of the Court below is in conflict with applicable decisions of this Court which hold that, for federal income tax purposes, the person who makes an actual investment in a depreciable asset and bears the risk of loss of its useful value, is entitled to a depreciation deduction thereon as against the person who has technical ownership thereof.

The Tax Court of the United States conceived—and correctly so, we submit—that this case and the *Grant* case* were determined by the decision of this Honorable Court in *Detroit Edison Company v. Commissioner*, 319 U.S. 98 (1943).

To develop this point, a brief reference to other decisions of this Court may be appropriate.

In *Weiss v. Weiner*, 279 U.S. 333 (1929), this Honorable Court, speaking through Mr. Justice Holmes, first announced the principle that actual investment plus the loss of useful value, determined the right to depreciation, rather than considerations of record title. In *Weiss v. Weiner*, the taxpayer had acquired by leases lands and buildings which he then subleased to others and, lacking an actual investment in depreciable assets, he claimed the right to a depreciation allowance because of his theoretical obligation to restore the leased buildings to his lessors. This Court denied his claim, pointing out that under the revenue laws, "the loss must be actual

* Described at some length in the Petition for Certiorari, see page 3, *supra*.

and *present*, not merely contemplated as more or less sure to occur in the future."

Then came *Helvering v. F. & R. Lazarus & Co.*, 308 U.S. 252 (1939), which involved a claim for depreciation on buildings *erected* by the taxpayer on lands which it conveyed to a trustee who in turn leased the properties back to the taxpayer under 99-year agreements. The Commissioner denied any depreciation allowance on the theory that the right to the deduction followed legal title; the taxpayer contended that it was the *actual investment* of funds which controlled. This Court sustained the taxpayer, stating:

"* * * Thus, the controlling statute permits* a taxpayer in computing net income to deduct a 'reasonable allowance for * * * exhaustion, wear and tear.' While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment. Where it has been shown that a lessee using property in a trade or business *must incur the loss resulting from depreciation of capital he has invested*, the lessee has been held entitled to the statutory deduction.

"Here, the taxpayer used business property in which it had a depreciable capital investment, provided it had not recovered its investment through a sale.

* We emphasize, by italics, a portion of this Court's Opinion because of its impact upon the thought of the Circuit Court in this case that accounting entries must control.

"* * * In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before the Board of Tax Appeals by requiring the Board to act 'in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.' Revenue Act 1928, § 601, 26 U.S.C. § 611, 26 U.S.C.A. Int. Rev. Acts, page 456." (Emphasis supplied)

The test prescribed in the *Lazarus* case was put to use and firmly established in *Detroit Edison Company v. Commissioner*, 319 U.S. 98 (1943). Although that case involved the opposite of the instant case, its principles are most appropriate. The *Detroit Edison* case involved the question of the right of a power company to a depreciation allowance on the portion of the cost of power lines paid by customers and this Honorable Court held that, although the utility had acquired title to the lines, it was *not* entitled to depreciation on the consumers' contributions because it had no *actual* investment therein and therefore did not bear the inevitable loss of useful value. In this connection, the Court employed the following practical guide which is most appropriate to the facts of the instant case:

"It will be seen that the rule applicable to most business property of a cost basis properly adjusted leaves many problems of depreciation accounting to be answered by *sound and fair tax administration*. The end and purpose of it all is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets. For this purpose

it is sound accounting practice annually to accrue as to each classification of depreciable property an amount which at the time it is retired will with its salvage value replace the original investment therein. Or as a layman might put it, *the machine in its life time must pay for itself before it can be said to pay anything to its owner.* Experience and judgment hit upon usable mortality tables for classes of property from which annual rates of accrual are estimated and several different methods are employed for relating this physical deterioration and functional obsolescence to financial statements. The calculation is influenced by too many variables to be standardized for differing enterprises, assets, conditions, or methods of business. The Congress wisely refrained from formalizing its methods and we prescribe no over-all rules." (Emphasis supplied)

The Tax Court's approach to the facts of the instant case followed these lines: the petitioner purchased the land for a certain price, which established the cost of the land. In order to induce the lessee to lease the land *and* building, the petitioner also agreed to pay part of the cost of the building and it fulfilled its agreement by actually contributing \$1,026,227.50 to the building cost. The lease agreement merely required the lessee to keep the building in repair; it did *not* obligate it to restore the premises at the end of the term. As a consequence, the petitioner was able to meet the requirements of the Detroit Edison test, viz., (1) it *paid* for its part of the building and (2) it bore the loss of useful value.

The Circuit Court's grounds for reversal of the Tax Court's decision are not exactly clear but from the

revised Opinion, it seems that the Circuit Court relied on three factors: (1) the petitioner did not own the building, (2) it treated its investment in the building, on its books, as land cost, and (3) it did not have the usual "risks" of an investment.

Let us analyze these points in the light of the principles expounded in the *Detroit Edison* case, *supra*, and other applicable decisions of this court:

1. AS TO OWNERSHIP. This point can be quickly dismissed. Not only is record title immaterial under the principles announced in the *Lazarus* and *Detroit Edison* decisions *supra*, but the truth of the matter is that, under Pennsylvania real estate law, which the Circuit Court ignored, the owner of the freehold also owns the permanent improvements, regardless of the source of the money which built them. *Union Building Company v. Pennell*, 78 F. (2d) 959 (C.C.A. 3rd, 1935), indicates recognition of this well known rule of Pennsylvania property law by the Court below and the many Pennsylvania Supreme Court decisions cited therein are certainly conclusive on the point.

2. AS TO ACCOUNTING ENTRIES. Again the *Lazarus* and *Detroit Edison* cases seem to be controlling. In the former decision, this Court declared:

"* * * In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding."

Moreover, in the field of depreciation, the Revenue Statutes themselves indicate, directly, the insignificance of accounting entries because, in determining gain or loss on the sale or exchange of a depreciable asset, the original cost must be adjusted, not only by deprecia-

tion actually "allowed," but also by depreciation "allowable." In other words, the *true* allowance for depreciation, rather than the deduction *per books*, is the significant factor. On this point,* this Court, in *Virginian Hotel Corporation of Lynchburg v. Helvering*, 319 U.S. 523 (1943), has declared:

"A reasonable allowance for depreciation is one of several items which Congress has declared shall be 'allowed' as a deduction in computing net income. Int. Rev. Code § 23(a)(1), 26 U.S.C.A. Int. Rev. Code, § 23(a)(1). The basis upon which depreciation is to be 'allowed' is the cost of the property with proper adjustments for depreciation 'to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws.' That provision makes plain that the depreciation basis is reduced by the amount 'allowable' each year whether or not it is claimed. *Fidelity-Philadelphia Trust Co. v. Commissioner*, 3 Cir., 47 F. 2d 36. Moreover the basis must be reduced by that amount even though no tax benefit results from the use of depreciation as a deduction. Wear and tear do not wait on net income."

3. AS TO INVESTMENT RISKS. It is at this juncture, we believe, that the Court below has misunderstood the principles enunciated by this Court in the decisions recited above. The *Detroit Edison* Opinion and its predecessors indicate that the right to depreciation is predicated upon two factors, viz., (1) an actual expenditure and (2) the risk of the loss of the fruits of

* Compare also the following language from Bureau Bulletin "F" that "the allowance in *any given year* must be determined in accordance with the conditions existing at the end of the year * * *."

the expenditure because of obsolescence or the passage of time. Both of these elements exist in the instant case in that the petitioner *did* invest its money in a depreciable asset and *was* in the position of sustaining the loss resulting from inevitable deterioration.

The Court below, however, seemed to believe that the lessor could not have a "depreciable investment" in the building, unless it was in the position of a joint adventurer, with some control over the operation of the building or the profits resulting from such operation. Needless to say, the decisions of this Court do *not* establish any such standard; on the contrary, the test is a practical one—has the taxpayer put his money in an asset which will diminish in value because of use and the passage of time?

II.

The Decision of the Court below that petitioner had no depreciable capital investment in the building is in conflict with decisions of the Circuit Courts of Appeal for the Fourth and Seventh Circuits which hold that a person who pays part of the cost of a depreciable asset has a capital investment therein and is entitled to a deduction for depreciation on his portion of such cost, even though he did not actually construct the asset or have legal title thereto.

On this branch of the argument we have a direct conflict between the opinion of the court below in the instant case and the opinions of other Circuit Courts of Appeal, and the conflict is emphasized by a *recent* action of the Commissioner of Internal Revenue *reversing* his prior rulings and accepting the doctrine of the Fourth and Seventh Circuits.

The opinion of this Court in the *Detroit Edison* case (*Detroit Edison Co. v. Commissioner*, 319 U.S. 98, *supra*) dealt with a situation in which the recipient of funds who later invested them in depreciable assets was denied the right to depreciation because, although he owned the assets, he suffered no loss of investment. In the instant case, the Court below, however, did allow depreciation to the person who had *no* funds invested, i.e., the petitioner's lessee,* and denied it to the petitioner whose investment is bearing the losses of deterioration.

Two Circuit Courts have apparently decided the same point in a way which is precisely contrary to the decision of the Court below in the instant case.

In *Gauley Mountain Coal Co. v. Commissioner*, 23 F. (2d) 574 (1928), the Fourth Circuit dealt with the right of a coal company to include in invested capital amounts which it had paid to a railroad to reimburse the latter for the cost of building a branch line to the mine. In ruling that the payments were a depreciable capital investment, the Court stated:

* The Circuit Court justified its action by pointing out that the lessee had issued stock to its parent corporation, Strasswill, a fact which appeared in the record of the *Grant* Case but not in the record of this case. However, it is quite clear that the Court below misconstrued the *Grant* record. Strasswill did not receive any cash from the petitioner, nor did it pay any *cash* into Grant for the latter's stock. Strasswill had the "*right*" to call upon the petitioner to pay part of the building cost and it apparently used this "*right*" as its consideration for the stock issued to it. Moreover, as we have pointed out, there is no evidence in this record that the petitioner sanctioned or even knew of Strasswill's later stock acquisition.

"The taxpayer has acquired property of permanent value in the same sense as does a manufacturing corporation which pays a railroad company to build an industrial siding to its plant, or a land development company which pays a bonus to a street railway company to build a line through its property.

* * * * *

"It is said that, because the track of the branch line is the property of the railroad, and no time is specified by the contract during which the railroad shall continue furnishing service over same, the taxpayer has received no property, tangible or intangible, for the expenditure it has made. But the important thing to the taxpayer is, not the ownership of the track, but the fact that by means of it is furnished the railroad connection desired. In the case of industrial sidings, just adverted to, the track is generally the property of the railroad."

In a later case, the same Circuit Court ruled that payments made by coal companies to a railroad company in settlement of litigation, in which the carrier claimed that the coal companies had agreed to pay part of the cost of constructing branch lines, were capital items and not expense: *Colony Coal & Coke Corporation v. Commissioner*, 52 F. (2d) 923 (1931). After quoting copiously from the *Gauley* case, *supra*, the Circuit Court declared:

"This case comes clearly under the rule laid down by this court in *Gauley Mountain Coal Co. v. Commissioner*, 23 F. (2d) 574, 577, where, under a like state of facts, the expenditure was held to be a capital one.

* * * * *

"It is contended on behalf of the petitioners that because any liability on the part of the coal companies to the railroad was denied, and the payments only made by way of compromise to avoid litigation, they constituted expense and not capital expenditures. We think not. The fact that a payment is made voluntarily or involuntarily, in the course of legal proceedings or as a result of a compromise settlement, does not change the nature of the transaction. The real test is the character of the transaction that occasions the payment."

The Seventh Circuit Court faced the same problem in *Cripple Creek Coal Co. v. Commissioner*, 63 F. (2d) 829 (1933), which involved a similar agreement by a coal company to reimburse a railroad company for part of the cost of a spur track. The coal company was not able to pay and eventually worked out a settlement providing for payments in the form of rebates. In holding that the cost was a capital item and that the payments could not be expensed, the Court declared:

"* * * When the actual cost became known, new agreements had to be and were made. The additional cost was a direct obligation of the petitioner. Again the latter, unable to advance the cash, was required to pay the amount advanced by another, out of its future business. This sum was fixed, as in the previous agreement, at \$3 per car. The amount of the installment and the basis upon which it was computed were, however, unimportant. The significant fact was that it was a payment in extinguishment of an obligation to pay the cost price of the spur track. Inasmuch as the cost price of this track was a capital investment [*Colony Coal & Coke Corp. v. Commissioner* (C.C.A.) 52 F. (2d)

923; *Gauley Mt. Coal Co. v. Commissioner* (C.C.A.) 23 F. (2d) 574], all sums paid by petitioner in extinguishment thereof fell under that head rather than 'ordinary and necessary expenses.' "

These rulings were not accepted by the Commissioner for many years, because he took the position that expenditures made for improvements not actually owned could not be depreciated but were deductible, if at all, as expenses. However, in the early part of this year, the Bureau modified its prior rulings to conform them to the Circuit Court decisions set forth above. This modification followed the recommendations of a Memorandum of General Counsel, which read in part as follows:

"In O.D. 1019 (C.B. 5, 151 (1921)), involving a similar case, it was held that depreciation determinable in accordance with the facts of the case was allowable to the taxpayer with respect to the cost to it of the portion of a siding owned by it, but that the cost to it of portions of the siding owned by a railroad company was deductible by the taxpayer as a business expense in the year incurred, and no depreciation was allowable to it with respect to that cost. In A.R.R. 1008 (C.B. I-2, 120 (1922)), it was similarly held that the cost to the taxpayer, a quarry operator, of the portion of a spur track owned by it should be treated as a deferred charge and written off pro rata over the estimated remaining life of the quarry from the date of construction of the spur track, but that the cost to it of the portion of the spur track owned by a railway company should be deducted as expense when incurred.

"In view, however, of the decisions in *Gauley Mountain Coal Co. v. Commissioner* (23 Fed. (2d), 574) [5 USTC Para. 1440], *Colony Coal & Coke Corporation v. Commissioner* (52 Fed. (2d), 923, Ct. D. 439, C.B. XI-1 278 (1932) [1931 CCH Para. 9574]), *Cripple Creek Coal Co. v. Commissioner* (63 Fed. (2d), 829, Ct. D. 731, C.B. XII-2, 192 (1934) [1933 CCH Para. 9235]), and *The Louisville Fire Brick Works, Inc. v. Commissioner* (43 B.T.A., 178 [CCH Dec. 11, 426], acquiescence, C.B. 1941-1, 7), this office is of the opinion that the entire cost paid or incurred by a mine operator for construction of a private siding or spur track to its mine is an exhaustible capital expenditure even though title to all or a portion of such siding or track immediately upon construction vests in a railway company. Accordingly, no part of such cost is deductible as a business expense or as a loss when paid or incurred, but the entire cost is depreciable or amortizable by the mine operator over the estimated useful life to it of the siding or spur track.

"It is recommended that O.D. 1019 and A.R.R. 1008, *supra*, be modified to accord with the foregoing conclusion. Such modification is consistent with the position taken by the Bureau and the court in *Colony Coal & Coke Corporation v. Commissioner, supra*. That opinion was published in the Internal Revenue Bulletin (C.B. XI-1, 278 (1932)). In that case the court held that payments made by corporations, owners of coal properties, to a railroad company for the construction of a branch line to the properties are capital expenditures amortizable over the estimated productive

life of the coal properties and not deductible as business expenses or as a loss when made, even though the branch line would be owned by the railroad company when built." (G.C.M. 25503, 1948-2-12730) *

III.

The Decision of the Court below is in conflict with applicable decisions of this Court which hold that a determination by the Tax Court on a matter of proper tax accounting, involving a pure question of fact or a mixed question of law and fact, may not be reversed by the Circuit Court of Appeals in the absence of a "clear-cut mistake of law."

It is recognized at the very outset that the doctrine of the *Dobson* case [*Dobson v. Commissioner*, 320 U.S. 489 (1943)] has been modified by statute (P. L. 773, 80th Cong. 2d Sess., Sec. 36, amending I.R.C. Sec. 1141 (a), 26 U.S.C. Sec. 1141 (a)). However, the change wrought by Congress is *by its terms* effective on September 1, 1948, and the principles of the *Dobson* case are still applicable to the prior decision of the Court below.

The Circuit Court endeavored to skirt the *Dobson* doctrine by arguing that the elements which *must* be

* At times, the opinion of the Circuit Court seems to suggest that the petitioner's investment in the building was the equivalent of the cost of inducing the lessee to take a lease. If so, the petitioner would still be entitled, *at the very least*, to amortize its cost over the 99-year period of the lease. Whether the schedule of depreciation should follow the term of the lease or the useful life of the asset would of course be a matter for the Tax Court.

present to constitute an "investment" are a matter of law or of legal measure. This may be true but the Circuit Court's discussion of the factual elements relied upon by the Tax Court indicates that its quarrel with the Tax Court was based upon the facts which it found and the inferences which it drew. Thus, the Circuit Court declares that "there isn't a modicum of evidence in the record of the enjoyment by Revere (petitioner) of any of the incidents of ownership in the Grant Building." This statement amounts to a flat charge that the Tax Court simply had no evidence to support its findings.* It is indeed difficult to justify such an accusation, when the *stipulated* facts before the Tax Court demonstrated that the petitioner bought and paid for the land, agreed to and did invest over a million dollars in the construction of the building and entered into a lease, the terms of which placed upon the petitioner the risk of loss by obsolescence and the inevitable loss due to deterioration.** As against these agreed fundamental facts, the Circuit Court could muster up only these facts: that the petitioner had entered its construction payments on its books as land cost, did not claim depreciation for several years and had no direct interest in the profits and losses of the building operations.

* Compare the Circuit Court's earlier statement that the Tax Court's action reminded it of the witness who said to a court: "Do you believe what you see or what I tell you?" (Opinion of Court below, as amended, p. 22) Compare also the statement by the writer of the Opinion, at the argument on the petition for rehearing, that the Tax Court had devoted only 25 minutes to the trial of the case. (Record of proceedings on rehearing, p. 10)

** The lessee had an obligation to keep the building in repair but not to replace it or surrender it in its original condition.

The controversial item of \$1,026,227.50 (of which the Court below said "Revere was the originating source") was expended in the construction of the Grant Building. Without this expenditure the building would never have existed as a completed income-producing unit. Therefore, it was a capital investment upon which depreciation is to be computed under Section 23(L) (2) of the Internal Revenue Code as "property held for the production of income." *It would be difficult to find a clearer case of disagreement on the facts and on the facts alone.*

Under these conditions, we cannot imagine language more appropriate than this Court's statement in the *Dobson* case (*Dobson v. Commissioner*, 320 U.S. 489, *supra*) that:

"Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand.

* * * * *

"* * * We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as matter of fact it found no economic gain and no use of the transaction to

gain tax benefit. *The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting.*" (Emphasis supplied)

Equally appropriate are the following phrases from the Opinion of this Court in *Commissioner v. Scottish American Investment Company*, 323 U.S. 119 (1944):

"The answer is to be found in a proper realization of the distinctive functions of the Tax Court and the Circuit Courts of Appeal in this respect. The Tax Court has the primary function of finding the facts in tax disputes, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable. The Circuit Courts of Appeal have no power to change or add to those findings of fact or to reweigh the evidence. And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence. The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such a basis is present the process of judicial review is at an end.

"* * * We do not decide or imply that the contrary inferences and conclusions urged by the Commissioner are entirely unreasonable or completely unsupported by any probative evidence. We merely hold that such contentions are irrelevant so long as there is adequate support in the evidence for what the Tax Court has inferred. It follows that the Tax Court's conclusions in this case cannot be set aside on appellate review.

"Moreover, this case exemplifies one type of factual dispute where judicial abstinence should be pronounced. The decision as to the facts in this case, like analagous ones that preceded it, is of little value as precedent. The factual pattern is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy on unravelling conflicting factual inferences. The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings."

IV.

The Decision of the Court below is in conflict with applicable decisions of other Circuit Courts of Appeal which hold that, in deciding the case before it, the Court may not take judicial notice of evidence appearing in the record of another case, unless such notice is necessary to prevent a grave miscarriage of justice and the person against whom the evidence is noticed is given an opportunity to rebut or explain such evidence before the trial court.

When a Court refers to facts *dehors* the record (see Opinion of Court below, pages 2, 3 and 4) but disclaims any use of them in arriving at its decision, it is difficult to argue the importance of the influence which the outside evidence may have had upon the decision. However, there are some significant points which indicate that the evidence in the *Grant* case was not ignored in the petitioner's case.

Grant, the rival claimant, on two occasions after the trial of the petitioner's case, endeavored to intervene in the proceedings but the Tax Court denied both motions. It should be clear that one taxpayer has no absolute right to intervene in another's tax litigation, but the Circuit Court says that it was reversible error for the Tax Court to refuse to hear the matters alleged in Grant's motions to intervene. Moreover, in so holding, the Court below used these words: " * * * the Tax Court, nevertheless, was put on notice and should have accordingly given to the record in evidence (in Grant's motions) the consideration *imperatively requisite* under the circumstances."

Equally significant is the fact that the Commissioner's argument before the Circuit Court was for the most part a plea that the Court remand the petitioner's case because of evidence appearing in the Grant record. Although this suggestion was not followed, the Court below heard both cases *together* and issued a *single* opinion reversing both Tax Court decisions.* Moreover, although the Court professed to need *only* the record in the petitioner's case to deny depreciation to the petitioner, it admittedly required the proof of the stock transaction between Strasswill and Grant appearing in the Grant record to allow the depreciation to Grant. *Not an iota of evidence of this transaction appears in the Revere record.* Although there may be cases where both the lessor and the lessee may be denied depreciation, this particular case, as the Commissioner admitted in his briefs below, clearly required a depreciation allowance *for either one or the other*. As a consequence we cannot see how the Court could have reached *both* decisions except by using or being affected by the same evidence.

There is also the point, mentioned in the recital of facts (*supra*, page 11), that the Circuit Court, in its original opinion, devoted several pages to the excoriation of the petitioner's counsel, on the ground that the Grant record revealed an alleged discrepancy in an exhibit used by him in the petitioner's case. Although this error and other errors appearing in the original opinion have since been corrected, its original occurrence indicates the con-

* In passing, it might be noted that the Government will receive a larger amount of tax if the depreciation here in question is allowed to Revere than if it is allowed to Grant.

fusion between the two records which undoubtedly prevailed.

This Court and many other federal courts have frequently emphasized the principle that a reviewing Court may not judicially notice evidence from another record except under the most unusual conditions and that in all such cases the person against whom the evidence is noticed must be given the opportunity to rebut or explain by further trial proceedings. Curiously enough a recent opinion by the Court below, written by the Judge who indited the opinion in this case, is very much in point. The case was *Funk v. Commissioner*, 163 F. (2d) 796 (1947) in which the rule was stated as follows:

"This appeal is taken from a decision of the Tax Court (six judges dissenting) in two consolidated cases. While the principal inquiry involved in the litigation relates to the scope of the petitioner's powers under certain trust instruments, the pressing question for our determination is whether the Tax Court may take judicial notice of its records in another case involving the same trusts but not the same taxpayer so as to make a critical fact finding in the instant litigation.

* * * * *

"The concept of judicial notice has long been recognized and understood, and its functions and effects have been appraised in learned dissertations. We are here dealing with a particular aspect of the doctrine, its application to the Court's own records. It is stated to be the general rule that courts will not travel outside a record in order to notice proceedings in another case, even between

the same parties in the same court, unless the proceedings are put in evidence. * * *

"In the Tax Court, judicial notice fares even less well. While the general principles of the doctrine are applied, generally speaking, findings of fact in a prior proceeding are treated merely as prima facie evidence, shifting the burden of going forward on the opposing party, when admitted in evidence in a subsequent proceeding involving the same parties. *Goodell-Pratt Co. v. Commissioner*, 1927, 6 B.T.A. 1235; *National Products Co. v. Commissioner*, 1928, 11 B.T.A. 511. The failure to take judicial notice of its own records in a pending proceeding involving the same instrument and the same party, although in a different capacity, was held not to constitute error. *Igleheart v. Commissioner*, 5 Cir., 1935, 77 F. 2d 704. The then Board of Tax Appeals recognized that facts not in the record are beyond the scrutiny of the court on appeal and that orderly procedure requires the parties to a dispute be given every opportunity to meet adversary contentions. *Edwards v. Commissioner*, 1939, 39 B.T.A. 735, 738 (limiting *Groves v. Commissioner*, 38 B.T.A. 727). Strictness of approach is especially evident in *Wholesale Coal Co. v. Commissioner*, 1929, 16 B.T.A. 550, 551. In that case the taxpayer called to the attention of the Board that all the facts pertinent to the issue had been determined in a prior proceeding involving the same taxpayer. Nevertheless, judgment was given for the Commissioner on the pleadings, it being held that it was incumbent upon the taxpayer to *introduce* such findings in evidence.

"In the case at bar, we find none of the motivating factors for taking judicial notice of the

record in the case of Funk. Certainly, at least, the petitioner deserved the opportunity to overcome the effects of that record, and, in the ordinary course of procedure, that record would not be without probative value to the Commissioner."

The Circuit Court of Appeals for the Sixth Circuit in the case of *A. G. Reeves Steel Const. Co. v. Weiss*, 11 F. (2d) 472, 474 (1941), certiorari denied, 314 U.S. 67 (1941), involving an appeal from a judgment dismissing a petition for recovery of allegedly overpaid income and excess profits taxes, stated the general rule pointed out as follows:

"* * * The general rule is that a court will not go outside the record before it to take notice of the proceedings in another case even between the same parties and in the same court, *unless such proceedings are put in evidence.* * * *" (Emphasis supplied)

To the same effect is *Morse v. Lewis*, 54 F. (2d) 1027, 1029 (CCA 4, 1932), certiorari denied, 286 U.S. 55 (1932).

In *Paridy v. Caterpillar Tractor Co.*, 48 F. (2d) 16 (CCA 7, 1931), the Court adhered to the general rule cited above and then, in discussing the *rationale* thereof said:

"The reason for the rule above referred to is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party; while if they had been properly introduced

they might have been met and overcome by him.
* * *

The holding in *National Surety Co. v. United States*, 29 F. (2d) 92 (CCA 9, 1928), to the effect that records not before the Court in the trial of a particular case cannot be resorted to for the purpose of supplying evidence in that trial, has been cited and followed repeatedly in subsequent decisions, and, together with the other cases cited herein, is decisive of the instant question.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 261

REVERE LAND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 36a-42a)¹ is reported at 7 T. C. 1061. The opinion of the Court of Appeals for the Third Circuit (R. 97-123) is not yet reported.

¹ "R" references are to those pages of the "Transcript of Record" which were printed as the Appendix to the Commissioner's brief in the court below, together with the proceedings before the Court of Appeals. The entire transcript of record is before the Court although not printed.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 18, 1948 (R. 80) and a petition for rehearing was denied on July 29, 1948 (R. 96). The petition for a writ of certiorari was filed on September 3, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals err in holding that taxpayer's payment of \$1,026,227.50 toward the cost of the office building erected by the lessee on taxpayer's land was not an investment by taxpayer in the building entitling taxpayer to depreciation under Section 23(1) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(1) [As amended by Section 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation*.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(26 U.S.C. 23.)

STATEMENT

The facts found by the Tax Court may be summarized as follows:

The taxpayer is a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania. Strasswill Corporation, hereinafter referred to as "Strasswill" and Grant Building, Incorporated, hereinafter referred to as "Grant," are also Pennsylvania corporations with principal offices in Pittsburgh, Pennsylvania. (R. 36a-37a.)

On July 30, 1927, taxpayer entered into a written agreement with Strasswill evidencing the fact that it was engaged in the acquisition of three adjoining parcels of land in Pittsburgh and providing that Strasswill was to have an option to lease this property if acquired by taxpayer upon the condition that lessee erect on the premises an office and garage building to cost not less than three million dollars. The agreement further provided that taxpayer was to furnish \$1,030,877.95 of the sum required to construct the building. (R. 37a.) On this same date, July 30, 1927, Strasswill assigned to Grant all of its rights under the contract and two days later, on August 1, 1927, Grant served formal notice upon the taxpayer of its exercise of the option. (R. 37a.)

On August 5, 1927, Grant entered into a contract with Thompson-Starrett Company for the erection of an office building and garage, at a cost limit of \$4,350,000, upon the property to be leased from taxpayer. On August 16, 1927, a lease agreement

was entered into between taxpayer and Grant pursuant to which Grant was leased the three parcels of land referred to above for a period of 99 years with the privilege of successive renewals for terms of 99 years. The rental to be paid was \$138,000 per year. Grant, the lessee, obligated itself to erect a building at a cost of not less than three million dollars in accordance with plans and specifications approved by the taxpayer, and, during the terms of the lease, to pay taxes and insurance and, in case of destruction of or damage to the building, to replace it as nearly as practicable. The lease further provided that the lessee was to keep the building in good order and repair and from time to time to make renewals and replacements so that at all times the building structures and equipment shall be in good order, condition and repair. At the termination of the lease, Grant was obligated to return the premises to the taxpayer, together with the structures thereon. (R. 37a-38a.)

Upon the execution of the lease, Grant proceeded to erect a 35-story stone and steel office building with a five-story underground garage which has a composite depreciable life of fifty years from the date of its completion on August 31, 1929 (R. 38a).

Taxpayer paid an aggregate of \$1,273,772.50 for the three parcels of land leased to Grant. This cost was later reduced to \$1,142,772.50 because of a payment by the City of Pittsburgh to taxpayer pursuant to condemnation proceedings (R. 38a-

39a). Taxpayer furnished \$1,026,227.50 toward the cost of the Grant Building which was expended solely in the construction of that building (R. 39a). The Tax Court held that taxpayer is entitled to a deduction for depreciation at the rate of two percent for each of the three taxable years upon its capital investment of \$1,026,227.50 (R. 42a).

The Court of Appeals for the Third Circuit reversed the decision of the Tax Court, holding that the Tax Court's finding that taxpayer had an investment in the Grant Building consisting of the amount of its payment toward the cost of the building was without support in the record (R. 116).

ARGUMENT

The taxpayer in the present case and another corporation (Grant Building, Inc.) are rival claimants for depreciation on an amount of \$1,026,227.50 which originated with taxpayer and was traced into the construction of a building erected by Grant Building, Inc. on land leased from the present taxpayer. Upon its books, this amount of \$1,026,227.50 was shown by taxpayer as "cost of land" and from the time of the completion of the building in 1929 until 1943, the taxpayer did not claim any allowance for depreciation. In 1943, the taxpayer filed claims for refund of income taxes paid with respect to the years 1939, 1940 and 1941, on the ground that it was entitled to depreciation on the \$1,026,227.50. Grant, on the other hand, from the time of the completion of the building, and until the

filing of the present taxpayer's claims for refund, claimed and was allowed depreciation on this amount. After the present taxpayer filed its petition with the Tax Court in the present case, the Commissioner disallowed deductions claimed by Grant for the years 1943 and 1944, whereupon Grant petitioned the Tax Court for a review of the resulting deficiency. The Tax Court held in the present case that Revere was entitled to the deduction and in Grant's case held that Grant was not entitled to the deduction. In the Third Circuit the Commissioner's appeal in the present case and Grant's appeal in its case were argued successively on the same day, and were disposed of by the Court of Appeals in one opinion, which, however, treats the two cases separately. That court, reversing both decisions of the Tax Court, held that Grant and not Revere was entitled to the claimed deduction.²

It is believed that this case presents no novel or important unsettled principle of general application; that the case turns upon its own peculiar facts; and that the result reached by the Court of Appeals upon these facts is not only consistent with the manner in which the parties themselves had treated the matter for some thirteen years, but is correct.

² The Government, in order to protect its interests, has secured an extension of time within which to file a petition for certiorari in the *Grant* case, but does not propose to file a petition if this Court does not grant certiorari in the present case.

1. The Court of Appeals correctly stated (R. 108) that a prerequisite for a depreciation deduction from taxable net income under Section 23(1) of the Internal Revenue Code, is an investment in the property sought to be depreciated. *Detroit Edison Co. v. Commissioner*, 319 U. S. 98; *Helvering v. F & R. Lazarus & Co.*, 308 U. S. 252; *Weiss v. Weiner*, 279 U. S. 333.³ The court likewise correctly stated (R. 109, 116) that its function was to ascertain whether the record discloses a "substantial basis" for the Tax Court's finding. *Dobson v. Commissioner*, 320 U. S. 489; *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124. The court thereupon entered upon an unusually exhaustive and detailed discussion (R. 111-116) of the evidence in the record in the present case. It concluded (R. 112, 113) that there was completely absent in the record any evidence of any agreement between the parties sustaining the Tax Court's

³ The taxpayer suggests (Pet. 25) that the Court of Appeals "seemed to believe" that the lessor could not have a depreciable investment in the building, unless it was in the position of a joint adventurer, with some control over the operation of the building or the profits resulting from such operation. We do not so read the opinion below. The discussion in the court's opinion to which the taxpayer adverts (R. 109-110) is, we believe, to the effect that there is no evidence in the record to indicate that the taxpayer, by virtue of its "contribution" was to share in the profits or losses of the Grant building; that taxpayer was not given any right, title, interest or control in or over the building by virtue of its contribution; and that the record is devoid of any evidence demonstrating that taxpayer considered itself as embarking upon a joint venture with Grant. The court was merely pointing out that taxpayer was not entitled to depreciation on any of these grounds but was not holding that these were the only grounds upon which depreciation could be predicated.

finding that taxpayer had made a "capital investment" in Grant, and that, on the other hand, the record overwhelmingly demonstrates that the disbursements by taxpayer were not intended to be a "capital investment" in the building and were, in fact, never asserted to be such until more than thirteen years later.

The opinion discloses, we believe, a proper understanding of the governing rules of law and an unusually thorough study of the record. In addition, the Court afforded the taxpayer the unusual opportunity to have any error in the opinion or judgment corrected by setting its petition for rehearing for unlimited oral argument before the court sitting *en banc*.⁴

2. The taxpayer asserts (Pet. 26-29) a conflict between the decision below and *Gauley Mt. Coal Co. v. Commissioner*, 23 F. 2d 574 (C.C.A. 4th); *Colony Coal & Coke Corp. v. Commissioner*, 52 F. 2d 923 (C.C.A. 4th); and *Cripple Creek Coal Co. v. Commissioner*, 63 F. 2d 829 (C.C.A. 7th). In those cases, the taxpayer coal companies were held to have capital investments in railroad lines built to their properties to the extent that they paid the cost of such lines even though they acquired no ownership of the lines. Those cases did not hold, however, that the mere tracing of a taxpayer's money into a building or other property alone

⁴ The reporter's transcript of this oral argument is on file in the office of the Clerk of this Court.

gives the taxpayer a capital investment of the character subject to a depreciation allowance. In the present case, the record required the conclusion that notwithstanding taxpayer's money can be traced into the construction of a part of the Grant Building, the money was in fact not an investment in the building in the coal cases sense of that term, but additional cost of land. The inapplicability of the coal cases here is demonstrated by taxpayer's principal error and that of the Tax Court in assuming that the expenditure by taxpayer of money which ultimately was used as part of the Grant Building construction funds was *per se* an investment in the building. Thus, taxpayer asserts (Pet. 17) that "It was stipulated as a fact (App. 6A) that the petitioner invested the sum of \$1,026,227.50 in" the Grant Building. Yet the stipulation merely states (R. 6A) "That the payment of \$1,002,500, made by petitioner * * * and the payment of \$23,727.50 * * * were both used, employed and applied exclusively and solely towards or on account of the cost of the construction and completion of the office and garage building known as the Grant Building." The Court of Appeals noted that the Tax Court proceeded under the same misapprehension stating (R. 109) "The Tax Court seems to have adopted the simple premise that since Revere's money had been used in the construction of the Grant Building * * * the transaction can consequently be regarded only as a 'capital investment.' "

There is no conflict with the doctrine of *Dobson v. Commissioner*, 320 U. S. 489. Here, the Court's rejection of the Tax Court's investment finding was on the ground that the finding was "without substantial basis." See *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124. In any event the amendment to Section 1141(a) of the Internal Revenue Code, effective September 1, 1948, made by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Section 36, has enlarged the scope of review by Courts of Appeals of Tax Court decisions to that obtaining in the review of district courts in civil actions tried without a jury. Accordingly, the applicability of the *Dobson* scope of review to this case presents no important question.

3. The taxpayer's charge that the Court of Appeals took judicial notice of the contents of the record in the companion case, *Grant v. Commissioner*, decided June 18, 1948 (R. 97), in a manner in conflict with various decisions of other Courts of Appeals⁵ (Pet. 14, 36-41) is without foundation. The court did not refer to "judicial notice" except in stating the Commissioner's alternative contention⁶ (R. 99); moreover, its views,

⁵ *A. G. Reeves Steel Const. Co. v. Weiss*, 119 F. 2d 472, 474 (C.C.A. 6th), certiorari denied, 314 U. S. 677; *Morse v. Lewis*, 54 F. 2d 1027, 1029 (C.C.A. 4th), certiorari denied, 286 U. S. 557; *Paridy v. Caterpillar Tractor Co.*, 48 F. 2d 166 (C.C.A. 7th); and *National Surety Co. v. United States*, 29 F. 2d 92 (C.C.A. 9th).

⁶ The Commissioner's position below, somewhat contrary to taxpayer's assertion (Pet. 37), was that the record required reversal of the Tax Court. Alternatively, it was argued that

in accordance with those expressed in the cases upon which taxpayer relies, have been vigorously stated in a recent opinion, *Funk v. Commissioner*, 163 F. 2d 796 (C.C.A. 3d). While it is true that in form the court wrote a single opinion (Pet. 37)⁷ in substance there were two. A two-page introduction showing the relationship of the cases to each other and the contentions of the parties (R. 97-99) concluded with the statement that (R. 99) "Since the Grant record contains evidence absent in the Revere case, the cases will be treated separately." There then followed two separate opinions appropriately labelled and a concluding paragraph reversing both Tax Court decisions. The structure of the opinion, the court's express disavowal in the opinion of the intermingling of the two records⁸ and its detailed discussion in connection with each case, devoted solely to the evidence in the respective records, demonstrate the lack of foundation in these charges.

the court could judicially notice the companion *Grant* record for the sole purpose of satisfying itself that a miscarriage of justice would result if the case were not remanded so that the additional evidence in the *Grant* record could be offered in this case.

⁷ The statement (Pet. 37) that the cases were heard together is inaccurate; they were heard consecutively under court oral admonition to confine the argument in each case to its own record.

⁸ See in this connection the transcript of the argument on the question of rehearing where the charge was rebutted by the court. Pp. 9, 51, 52.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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